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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TONY SALVADORE JIMENEZ, JR., Defendant and Appellant.	C074048 (Super. Ct. No. 08F07560) OPINION ON REMAND

Defendant Tony Salvadore Jimenez, Jr., was sentenced to 28 years to life in prison for crimes he committed when he was 16 years old. In our nonpublished opinion in *People v. Jimenez* (Dec. 2, 2015, C074048), we determined that his sentence did not violate the Eighth Amendment as a functional equivalent of a life sentence without the possibility of parole (LWOP) because under Penal Code section 3051[1] he will be eligible

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[1] Further undesignated statutory references are to the Penal Code.

for release on parole during his 25th year of incarceration, when he is approximately 44 years old.[2] We also concluded that his punishment fit his crimes.

Our Supreme Court granted review of our opinion, and stayed the matter pending its decision in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). Thereafter, in *Franklin,* the court held that section 3051 moots a juvenile defendant's constitutional challenge to a mandatory LWOP sentence. (*Franklin*, at p. 268.) Because the defendant there was sentenced before *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed.2d 407] (*Miller*) was decided and section 3051 was enacted, the court remanded the matter to the trial court "for the limited purpose of determining whether [defendant] was afforded an adequate opportunity to make a record of information that will be relevant to the Board [of Parole Hearings] as it fulfills its statutory obligations under sections 3051 and 4801." (*Franklin,* at pp. 286-287.)[3] The court transferred this matter back to this court with directions to vacate our prior decision and reconsider the matter in light of *Franklin*.

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[2] Section 3051, subdivision (b)(3) provides: "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."

[3] Section 4801, subdivision (a) provides in pertinent part: "The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause . . . ." Subdivision (c) of that section further provides: "When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

Pursuant to *Franklin*, we shall again affirm defendant's sentence because pursuant to section 3051 he has a meaningful opportunity for release during his 25th year of incarceration. As such, his constitutional claim is moot. (*Franklin, supra,* 63 Cal.4th at pp. 268, 279-280.) Consistent with *Franklin*, we also shall remand the matter to the trial court for a determination of whether defendant was afforded an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings (Board) at his future youth offender parole eligibility hearing.

FACTUAL BACKGROUND[4]

On the night of July 15, 2007, defendant and several other young males arrived at a house party uninvited. They identified themselves as "Diamonds" or "Norteños" and began harassing people at the door and otherwise tried to control the party. When asked to leave, the young men, including defendant, fired guns at, toward, or in the vicinity of the house, while surrounded by innocent partygoers. In addition, defendant pointed his gun at victim Walter Bivins and tried to shoot, but the gun jammed. Defendant also shot towards victim Michael Ramirez, who was struck in the leg and suffered a through-and-through bullet wound. At the time of the events at issue, defendant was 16 years old and a member of the Varrio Diamonds subset of the Norteño street gang.

A jury found defendant guilty of one count of discharging a firearm at an inhabited dwelling (§ 246; count one) and two counts of assault with a semi-automatic firearm (§ 245, subd. (b); counts two [Ramirez] & three [Bivins]). The jury also found true allegations that all of the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), defendant was principal in count one and during the commission of that offense a principal personally used and intentionally discharged a firearm, causing great bodily injury (§ 12022.53, subds. (b), (c), (d), (e)(1)), and defendant personally used

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[4] Consistent with the parties' briefing, the facts are taken from our prior nonpublished opinion in *People v. Jimenez* (Oct. 24, 2012, C065269).

a semi-automatic handgun in the commission of counts two and three (§ 12022.5, subd. (a)). The jury found not true a great bodily injury allegation in connection with count two (§ 12022.7, subd. (a)).

Defendant was sentenced to an indeterminate term of 40 years to life in state prison, consisting of 15 years to life on count one (§§ 246, 186.22, subd. (b)(4)(D)), and 25 years to life for the firearm enhancement (§ 12022.53, subd. (d).) On direct appeal, this court affirmed the judgment but vacated the sentence. We found that the trial court erroneously imposed both a 15-year-to-life term for the gang enhancement and a 25-year-to-life term for the firearm enhancement on count one, and we remanded the case for resentencing. (*People v. Jimenez, supra*, C065269.)

In his sentencing brief, defendant, through his attorney, asked the trial court "to consider staying any life sentence altogether, and impose a reasonable determinate sentence" in light of "the recent series of cases (decided after [his] original sentencing)," namely *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed.2d 407] (*Miller*), *Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825] (*Graham*), and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). Defendant acknowledged that such cases, while not strictly on factual point with the current case, should be considered in determining the ultimate length of the sentence imposed. He further asserted that "[a]n unduly lengthy sentence imposed against a defendant who was 16 years old at the time of the crime (particularly a non-homicide offense), may be considered cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." Alternatively, he requested the court consider imposing an aggregate term of 28 years to life, consisting of the low term of three years on count one, plus a consecutive term of 25 years to life for the gun enhancement and stay his sentences on the remaining counts and enhancements. He submitted a number of character letters and certificates and commendations received while in prison in support of his requests.

Defendant was sentenced to an aggregate term of 28 years to life in state prison, consisting of the lower term of three years on count one, plus a mandatory 25 years to life for the firearm enhancement for count one, a concurrent six years on count two, plus four years for the gun enhancement on count two, and a concurrent six years on count three, plus four years for the gun enhancement on count three. The trial court stayed defendant's sentence on the gang enhancement as to all counts. The trial court acknowledged that the sentence it imposed was "harsh" but stated that "it obviously does not fall within the category of a cruel and unusual sentence." The court further observed that while defendant's trial counsel made "some very compelling points as to why [defendant] should be potentially released earlier than the date that I set," it noted that its "authority is somewhat restricted in terms of the mandatory sentencing laws."

DISCUSSION

I

Section 3051 Moots Defendant's Constitutional Challenge to His Sentence

Under the Eighth Amendment's prohibition against cruel and unusual punishment, a juvenile convicted of nonhomicide offenses may not be sentenced to LWOP. (*Graham*, *supra*, 560 U.S. at p. 82.) In *Caballero*, the California Supreme Court followed *Graham* and vacated a 110-year-to-life sentence imposed on a juvenile convicted of attempted murder, concluding that the sentence amounted to the functional equivalent of LWOP. (*Caballero*, *supra*, 55 Cal.4th at p. 265.) The court concluded that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Id.* at p. 268.)

Following *Graham* and *Caballero*, the Legislature enacted Senate Bill No. 260

(2013-2014 Reg. Sess.) (Senate Bill No. 260), to bring juvenile sentencing into conformity with those cases. "At the heart of Senate Bill No. 260 was the addition of section 3051, which requires the Board to conduct a 'youth offender parole hearing' during the 15th, 20th, or 25th year of a juvenile offender's incarceration. (§ 3051, subd. (b).) The date of the hearing depends on the offender's ' "[c]ontrolling offense," ' which is defined as 'the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.' (*Id*., subd. (a)(2)(B).) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is 'eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.' (*Id*., subd. (b)(3).)" (*Franklin, supra*, 63 Cal.4th at p. 277.) Thus, a juvenile offender who is entitled to a parole hearing under section 3051 has a meaningful opportunity for release. Accordingly, section 3051 moots the juvenile offender's constitutional challenge to a mandatory LWOP sentence. (*Franklin*, at p. 280.)

Here, defendant's controlling offense is his mandatory 25 years to life on the firearm enhancement under section 12022.53, subdivision (d) and (e)(1). (Cf. *Franklin, supra*, 63 Cal.4th at p. 279 [either "mandatory term of 25 years to life under section 190 for first degree murder" or "mandatory term of 25 years to life under section 12022.53 on the firearm enhancement" "could be considered the 'controlling offense' under section 3051, subdivision (a)(2)(B)"].) Under section 3051, defendant is therefore eligible for a youth offender parole hearing in the 25th year of his incarceration, when he is 44 years old. This sentence is neither LWOP nor its functional equivalent. Accordingly, section 3051 moots defendant's constitutional challenge to his sentence.

II

Defendant is Entitled to a Limited Remand

To effectuate Senate Bill No. 260's purpose of providing a juvenile offender with a meaningful opportunity to obtain release, the *Franklin* court held that a juvenile offender is entitled to an opportunity to make a record of information relevant to his or her eventual youth offender parole hearing. Such information may include statements from " '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime' " and results of " 'psychological evaluations and risk assessment instruments' " when the offender was a juvenile. (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.) Because the court could not determine on the record before it whether the defendant was afforded a sufficient opportunity to present such relevant information, it remanded the matter to the trial court for "the limited purpose of determining whether Franklin was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations . . . ." (*Id*. at pp. 286-287.) The court further stated: "If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Id*. at p. 284.)

Here, the parties dispute whether defendant was afforded a sufficient opportunity to present information relevant to his eventual youth offender parole hearing at his most recent sentencing hearing, and whether the matter should be remanded to the trial court for the limited purpose of making such a determination. The Attorney General argues

that remand is unnecessary because defendant "has already had a full opportunity to introduce and argue all mitigating evidence, including his youthful characteristics and juvenile status." More particularly, the Attorney General asserts that defendant was resentenced after *Miller* was decided and "was afforded sufficient opportunity to make a record regarding his characteristics and circumstances at the time" he committed the underlying offenses. Defendant counters that he "did not have sufficient opportunity to make a record for section 3051 purposes," and thus, the matter should be remanded to allow him to do so. Defendant notes that he was resentenced after the passage of section 3051, and that the "[l]etters submitted to the court at the time of [his] 2013 resentencing hearing" merely "hint[ed] at aspects of [his] life and mental state at the time of the offense . . . ." "Given the importance of these factors to [defendant's] possible release under the statute," defendant contends that he "is entitled to an examination of these factors in the depth and detail relevant to the youthful offender parole hearing outlined in section 3051. School records, test scores and psychological assessments, letters from other teachers, faith providers and community workers are just some of the evidence that potentially may assist [him] at the time of the hearing."

While defendant did assert a cruel and unusual punishment claim under *Miller, Graham,* and *Caballero* at his 2013 resentencing, we cannot say it is clear that he has already had an opportunity to develop the record contemplated by *Franklin*. First, as defendant recognized in his sentencing brief, those cases were not directly on point. In *Miller,* the United States Supreme Court held that "*mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.' " (*Miller, supra,* 567 U.S. at p. __ [183 L.Ed.2d at pp. 414-415], italics added.) While the court did not impose a categorical ban on LWOP for juveniles, it set forth the following factors, the so-called *Miller* factors, that sentencing courts must consider before sentencing a juvenile homicide offender to LWOP: (1) "his chronological age and its hallmark features—among them, immaturity,

impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation." (*Id.* at p. ___ [183 L.Ed.2d at p. 423].) Thereafter, in *Graham*, the court held that juveniles who are convicted of nonhomicide offenses may not be sentenced to LWOP. (*Graham, supra*, 560 U.S. at p. 82.) In *Caballero*, our Supreme Court extended *Graham* to cases where the sentence amounted to the functional equivalent of LWOP. (*Caballero, supra*, 55 Cal.4th at p. 265.) Defendant was convicted of nonhomicide offenses, and thus was not eligible for LWOP at the time of his resentencing, and thus, the *Miller*-factors were not directly at issue. Defendant simply urged the court to consider the rationale of those cases in determining the ultimate length of his sentence. Moreover, defendant was resentenced before the enactment of section 3051, and thus, was not on notice that he should make a record of information relevant to his eventual youth offender parole hearing.

For these reasons, we conclude defendant is entitled to a limited remand pursuant to *Franklin*.

III
Section 12022.53, Subdivision (h) Precludes
the Trial Court From Dismissing the Gang Enhancement

Finally, defendant contends that the California Supreme Court's recent decision in *People v. Fuentes* (2016) 1 Cal.5th 218, "mandates remand to the trial court to consider exercise of its discretion to dismiss the gang enhancements pursuant to Penal Code

section 186.22, subdivision (b)(1)." The issue in *Fuentes* was whether a trial court has the discretion under section 1385, subdivision (a) to dismiss a gang enhancement (§ 186.22, subd. (b)(1)), or if the court is limited to its authority under section 186.22, subdivision (g), which provides that " '[n]otwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section?' " (*Fuentes*, at p. 222.) In finding the trial court did have the discretion under section 1385, subdivision (a) to dismiss the gang enhancement, the court observed that "there must be ' "a clear legislative direction" ' eliminating the trial court's section 1385 authority" and concluded that such direction was lacking. (*Fuentes*, at pp. 226, 231.)

As the Attorney General points out, section 12022.53, subdivision (h) does contain a clear legislative direction eliminating the trial court's section 1385 authority and is applicable here. That subdivision provides: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (§ 12022.53, subd. (h).) Here, the jury convicted defendant of shooting at an inhabited dwelling and found true allegations that the offense was committed for the benefit of a criminal street gang (§ 186.22) and defendant was a principal in that offense and during the commission thereof a principal personally used and intentionally discharged a firearm, causing great bodily injury (§ 12022.53, subds. (d), (e)(1)). Section 12022.53, subdivision (e)(1) states: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." Because the gang enhancement allegation (§ 186.22) brought defendant within the provisions of section 12022.53, subdivision (e)(1), the trial court is precluded from dismissing it under section 12022.53, subdivision (h).

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of determining whether defendant had an opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801, and if not, to allow both parties the opportunity to make such a record consistent with *Franklin*, *supra*, 63 Cal.4th 261.

/s/
Blease, J.

We concur:

/s/
Raye, P. J.

/s/
Duarte, J.